

ORIGINAL

RECEIVED

SEP 5 1996

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF SECRETARY

In the Matter of) MM Docket No. 96-110
)
WKZF-FM, INC.) File No. BRH-950814UC
)
For Renewal of License)
for Station WKZF(FM))
Bayboro, North Carolina)

DOCKET FILE COPY ORIGINAL

To: Administrative Law Judge
John M. Frysiak

MASS MEDIA BUREAU'S OPPOSITION TO
MOTION FOR SUMMARY DECISION AND
COUNTERMOTION FOR SUMMARY DECISION

1. On August 28, 1996, WKZF-FM, Inc. ("WKZF") filed its Motion for Summary Decision in this proceeding. The Mass Media Bureau ("Bureau"), pursuant to Section 1.251 of the Commission's Rules, 47 C.F.R. §1.251, hereby opposes WKZF's motion and submits its own Counter-motion for Summary Decision.

WKZF's Motion

2. WKZF seeks to establish the following in order to demonstrate that grant of its license renewal application is warranted: that it has the capability and intent to expeditiously resume the broadcast operations of Station WKZF(FM), Bayboro, North Carolina, consistent with the Commission's Rules; that it has not violated Sections 73.1740 and/or 73.1750 of the Commission's Rules; and that, in light of the evidence adduced pursuant to the preceding issues, that grant of the subject license renewal application would serve the public interest,

056

convenience and necessity. See *Hearing Designation Order* in MM Docket No.96-110, DA 96-724, released May 9, 1996 ("*HDO*").

3. Pursuant to Section 1.251 of the Commission's Rules, in order to warrant summary decision, a party must show that there is no genuine issue of fact for determination at the hearing. To sustain a motion for summary decision, it must be established that "the truth is clear," that "the basic facts are undisputed," and that "the parties are not in disagreement regarding material factual inferences that may be properly drawn from such facts." *Big Country Radio, Inc.*, 50 FCC 2d 967 (Rev. Bd. 1975). The Bureau asserts that the facts of this case are not in dispute, and that only the legal significance of those facts remains at issue.

4. To meet the specified issues, WKZF asserts that it assumed control of the station, then dark since mid-1993, by assignment consummated on February 2, 1995. On March 20, 1995, WKZF notified the Commission of the consummation of the assignment, and requested that a condition on the assignment be modified to permit it to file a facilities upgrade application. The Bureau approved the request and modified the previously conditioned license to require resumption of station operations within 240 days from the date of consummation, *i.e.*, November 20, 1995.¹

5. WKZF states that in June 1995, it engaged the services of Mr. Timothy Warner, a professional engineering consultant, to assist it in the preparation of an upgrade application.

¹ *HDO*, at 1-2.

It relates that Mr. Warner first reviewed the station's technical options on September 26, 1995,² and proposed an engineering study to determine whether the use of a directional antenna on an existing tower, which would save time and money and would allow service to a larger area, would be consistent with the Commission's rules. WKZF also contacted structural engineers to assess the strength of the existing tower and the costs of necessary replacement work. In addition to assessing this potential new site, WKZF was also determining whether it might instead utilize the authorized transmitter site, for which it had been denied access, rather than start anew from a different site. According to WKZF, the reconsideration of the original site caused the work proposed by Mr. Warner, the engineering consultant, to be postponed.

6. WKZF filed the subject renewal application on August 14, 1995. Therein, it noted that the station remained off the air, but that it was developing the engineering to apply for the facilities upgrade. WKZF states that prior to the designation of the renewal application for hearing, it and its consulting engineers completed the technical work and analysis of the proposed new site. It states that it filed an application to upgrade its facilities on August 27, 1996, is now prepared to move forward with construction, and estimates that it can return the station to the air within 60-90 days of the grant of the modification application.

² WKZF states that the former licensee's tower site was considered unsafe due to the extensive deterioration of the tower. It further relates that even after it became the station licensee, WKZF was not permitted to inspect the station's tower site to determine whether repair was feasible. Thus, it states, it estimated that it would take as much time, if not more, to utilize the authorized site to return the station to the air as it would to obtain FCC consent to and to implement an upgrade application.

7. WKZF contends that there are no genuine issues as to any material fact and that no useful purpose would be served by a hearing. It maintains that the facts indicate that it has made diligent efforts and is committed to return the station to the air and serve a larger area. WKZF further argues that in light of its efforts, it would be contrary to the public interest to deny renewal in this case because service to Bayboro would be further delayed or even jeopardized entirely. WKZF contends that it should not be held responsible for the failures of the previous licensees of the station, and that to do so would penalize its "innocent" creditors for the negligence of the previous licensees who were not aggressive enough in restoring service.³ It states that any benefit to be derived from the denial of the renewal application is outweighed by the equities favoring both the resumption of service and protection of innocent creditors.

8. WKZF also notes that Section 312(g) of the Communications Act of 1934, as amended by the Telecommunications Act of 1996, directs that the license of a broadcast station that has been silent for twelve consecutive months will automatically terminate at the end of that period without any discretion for the Commission to authorize additional time. It also notes the Bureau's position that it will not expedite the processing of applications involving silent stations whose renewal applications have been designated for hearing. In its case, WKZF states that if its station is not back on the air by February 7, 1997, the station's

³ WKZF recognizes that it did not notify the Commission that it was not going to resume service by November 20, 1995, as required by Section 73.1740 of the Commission's Rules. However, it states that it never intended to permanently discontinue station operations, and thus is not in violation of section 73.1750 of the Rules. Nevertheless, WKZF maintains that even if the Commission finds some fault with regard to its actions, "its innocent creditors should not be forced to lose their entire investment in the station as a result."

license will automatically expire. Thus, it asserts that there is little point in forcing the parties and the Commission to go through a renewal hearing if there will be no time under the statute to get authority to return the station to the air at its proposed site even if its license is renewed. It maintains that this situation places the licensee and the public interest in a "no-win" situation that can be avoided by the issuance of a Summary Decision renewing the WKZF(FM) license immediately and the prompt processing of its modification application that will enable the station to expeditiously resume service. WKZF thus asserts that summary decision is warranted in this case because, despite its admitted rule violations, a grant of its renewal application conditioned upon the prompt restoration of service will serve the public interest.

The Motion for Summary Decision Cannot Be Granted

9. In an effort to meet its burden under Issue 1 in the *HDO*, WKZF sets forth and emphasizes its efforts to prepare a facilities modification application from February, 1995, through August, 1996, and disavows what it terms the past licensees' failures to return the station to the air. It also sets forth a plan to restore service based on the facilities modification application filed long after its November 20, 1995, extended deadline to resume broadcast operations and almost four months after its renewal application was designated for hearing. WKZF's proposal, however, ignores its own failure, as the licensee of WKZF, to expeditiously restore station operations and to seek continued authority for the station to remain silent. In this proceeding, it is WKZF's burden to demonstrate that *its own* pre-designation conduct was not dilatory in order to meet the specified issues and obtain grant of

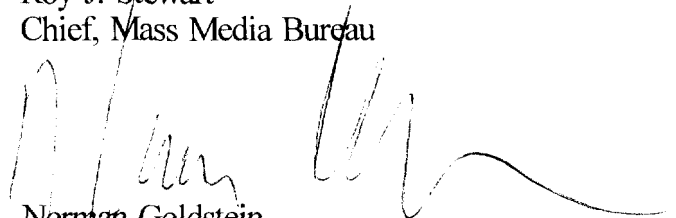
its renewal application. As is clear from the pleadings, WKZF has not and cannot make that showing. In sum, the only justification that WKZF provides for the grant of its renewal application is that it has now filed a modification application. Such a showing is not sufficient to meet its burdens with respect to the issues designated in the *HDO*. The critical issue in this proceeding is whether, in light of this licensee's conduct, grant of the renewal application serves the public interest. Before WKZF's renewal application can be granted, the Presiding Judge must resolve this outstanding issue in the licensee's favor which, as shown here, cannot be done. Consequently, WKZF's motion for summary decision in its favor must be denied.

The Bureau's Countermotion for Summary Decision

10. From the facts set forth in WKZF's pleadings, the appropriate legal inferences require that the Bureau's countermotion for summary decision be granted. Absent a modification of facilities, it is clear that WKZF can not return the station to the air and it is the Bureau's policy not to process modification applications of silent stations that have been designated for hearing. Thus, it is clear that WKZF cannot return the station to the air and cannot meet its burdens under the designated issues. Accordingly, the Presiding Judge must grant the Bureau's Countermotion for Summary Decision, deny WKZF's renewal application,

and terminate this proceeding.

Respectfully submitted,
Roy J. Stewart
Chief, Mass Media Bureau



Norman Goldstein
Chief, Complaints &
Political Programming Branch

Alan E. Aronowitz
Attorney
Mass Media Bureau

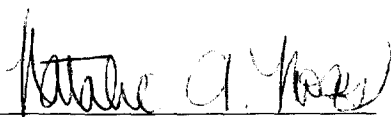
Federal Communications Commission
2025 M Street, N.W.
Suite 7212
Washington, D.C. 20554
(202) 418-1430

September 5, 1996

CERTIFICATE OF SERVICE

Natalie Moses, a secretary in the Hearing Branch, Mass Media Bureau, certifies that she has on this 5th day of September 1996, sent by regular United States mail, U.S. Government frank, copies of the foregoing "**Mass Media Bureau's Opposition to Motion for Summary Decision and Countermotion for Summary Decision**" to:

WKZF-FM, Inc.
c/o Rick D. Rhodes Esq.
Irwin, Campbell & Tannenwald, P.C.
1730 Rhode Island Avenue, N.W.
Suite 200
Washington, DC 20036-3101



Natalie Moses